

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES, SAN FRANCISCO OFFICE**

NP RED ROCK LLC d/b/a
RED ROCK CASINO RESORT SPA

and

Cases 28-CA-244484
28-CA-250950

CLAUDIA MONTANO, an Individual

and

Cases 28-CA-250229
28-CA-250282
28-CA-250873
28-CA-252591
28-CA-253276
28-CA-254470
28-CA-254510
28-CA-254514
28-CA-260640
28-CA-260641
28-CA-262187
28-CA-262803
28-CA-164605

NP BOULDER LLC d/b/a
BOULDER STATION HOTEL & CASINO

and

Case 28-CA-254155

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS
a/w UNITE HERE INTERNATIONAL UNION

NP PALACE LLC d/b/a
PALACE STATION HOTEL & CASINO

and

Case 28-CA-254162

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS
a/w UNITE HERE INTERNATIONAL UNION

NP RED ROCK LLC d/b/a
RED ROCK CASINO RESORT SPA

and

Case 28-RC-252280

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS
a/w UNITE HERE INTERNATIONAL UNION

ORDER DENYING MOTION FOR RECONSIDERATION

The General Counsel moves for reconsideration of the attached October 23, 2020 order granting Respondent Red Rock's petition to revoke GC subpoenas ad testificandum A-1-AIUQ3D and A-1-1AIV91L.¹ The subpoenas sought to require Frank and Lorenzo Fertitta, the top corporate executives of Red Rock Resorts, Inc. and Station Casinos LLC, to appear and testify along with certain other subpoenaed company managers, supervisors, and/or agents as FRE 611(c) adverse witnesses at the outset of the hearing in this consolidated proceeding.²

The GC's motion for reconsideration raises nothing that was not previously argued in the GC's opposition to the petition to revoke or considered. In particular, the motion does not cite any significant new facts or circumstances regarding Respondent's rebuttal or defense to the subject preelection benefits-package allegations, based on either the documents produced by Respondent and the Fertittas pursuant to the GC's subpoenas duces tecum or Respondent's assertions or statements during or since the hearing on October 27, warranting reconsideration of the October 23 order. Indeed, the motion for reconsideration acknowledges (p. 4 n. 5) that "the details of Respondent's rebuttal" remain "somewhat speculative."

Further, contrary to the motion, the October 23 order did not fail to consider the GC's obligation to carry the ultimate burden of proving the alleged benefit-package violations by a preponderance of the credible record evidence. The order simply concluded that, based on all the circumstances, including the speculative relevance and probative value of the Fertittas' testimony to proving the alleged violations under Board precedent, permitting the GC to subpoena and question the Fertittas as adverse witnesses at the outset of the hearing, during the GC's case-in-chief, would not promote the policies underlying the federal rules of evidence. See FRE 102 (stating that the federal rules "should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination"); 403 (stating that even relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of . . . undue delay, wasting time, or needlessly presenting cumulative evidence"); and 611(a) (stating that a court "should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment . . ."). See also Sec. 102.35(a)(6) of the Board's Rules (granting ALJs authority to "regulate the course of the hearing"); and *Indianapolis Glove Co.*, 88 NLRB 986, 987 (1950) ("It is appropriate for

¹ Respondent's counsel orally advised during a Zoom conference on November 5 that Respondent opposes the GC's motion for reconsideration.

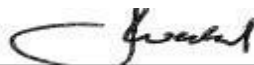
² The hearing opened as scheduled on October 27 to address any outstanding issues regarding subpoenas and the production of documents. It is scheduled to resume on November 9 and continue on various agreed dates through January 2021. Counsel advised during prehearing conferences and at the hearing that the GC's intention is to begin the case-in-chief by calling the subpoenaed company officials, managers, and supervisors as 611(c) adverse witnesses.

the Trial Examiner to direct the hearing so that it may be confined to material issues and conducted with all expeditiousness consonant with due process.”).³

Finally, the motion fails to specify how the October 23 order quashing the Fertitta subpoenas at this time would unfairly prejudice the GC’s ability to carry the ultimate burden of proving the alleged violations. Nothing in that order prevents the GC from cross-examining the Fertittas if Respondent calls them to testify, or from requesting an adverse inference if Respondent fails to call the Fertittas to testify. As indicated in the order, the GC is also free to seek reconsideration and require the Fertittas to appear and testify as adverse witnesses pursuant to the subpoenas if and when the GC can show that their testimony would be relevant to any of the disputed allegations or issues and that its probative value would not be substantially outweighed by a danger of undue delay, wasting time, or needlessly presenting cumulative evidence.⁴

Accordingly, the motion for reconsideration is denied.

Dated, San Francisco, California, November 5, 2020



Jeffrey D. Wedekind
Administrative Law Judge

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³ The GC’s motion (p. 4 n. 4) also suggests that the October 23 order improperly revoked the subpoenas on a ground not asserted in the Respondent’s petition to revoke. However, the petition to revoke (p. 6) specifically argued that the Fertitta subpoenas should be revoked because the circumstances indicated that the GC was “seeking to engage in a fishing expedition.” Fishing expeditions are discouraged in legal proceedings precisely because they are grounded in speculation and would likely burden the record with irrelevant information. See, e.g., *Tradesmen International, Inc.*, 351 NLRB 399, 424 (2007); and *Williams v. Clark*, 2009 WL 3366913, *13 (C.D. Calif. Oct. 16, 2009).

⁴ The GC’s opposition and motion indicate that the GC is already in possession of sufficient evidence, based on admissions of other high-level company officials, to prove the Fertittas were involved in the benefits package. See Opp at 3; and Motion at 7 & n. 9.

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Case 28-RC-252280

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS
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**ORDER GRANTING RESPONDENT'S PETITION TO REVOKE GENERAL
COUNSEL SUBPOENAS AD TESTIFICANDUM A-1-AIUQ3D AND A-1-1AIV91L**

Respondent Red Rock petitions to revoke two subpoenas ad testificandum (A-1-AIUQ3D and A-1-1AIV91L) that the General Counsel served on Frank Fertitta III and Lorenzo Fertitta to appear and testify at the hearing in this consolidated unfair labor practice and postelection objections proceeding, which is scheduled to commence October 27 via Zoom.⁵ Frank Fertitta III is the CEO and Chairman of the Board of Red Rock Resorts, Inc. and CEO of Station Casinos LLC. Lorenzo Fertitta is Vice Chairman of the Board of Red Rock Resorts, Inc. and Vice President of Station Casinos LLC.⁶

The petition to revoke is granted. Section 102.31(b) of the Board's Rules states, in relevant part, that a subpoena will be revoked if

the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is invalid.

The GC's opposition asserts that the Fertittas' testimony is relevant to the complaint's allegations that Respondent granted a package of benefits to employees shortly before the December 19–20, 2019 representation election to discourage employees from supporting the Union in violation of Section 8(a)(1) of the Act. The benefits package allegedly included, among other things, an HMO health plan offered at zero cost to employees and their spouses and children, onsite medical centers with free and fast visits, a company paid retirement plan, and an employee recognition program. The GC asserts that there is every reason to believe the Fertittas, sitting at the head of the organization, would have personal knowledge as to how, when, or why Respondent Red Rock formulated such a major employee benefits package and would have been directly involved in deciding to grant the benefits package to employees before the election.

However, as indicated by Respondent, the complaint itself does not allege that the Fertittas made the decision to grant the benefits package before the election; rather, it alleges that other high level managers granted the benefits, including General Manager Scott Nelson and Senior VP of HR Phil Fortino. Indeed, until the most recent, fourth consolidated complaint, which issued October 8 and added various other allegations, the GC did not even mention the Fertittas or allege that they are Respondent's supervisors and/or agents (which Respondent's October 22 answer admits).

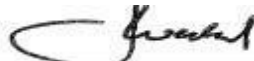
⁵ The Respondent's petition to revoke was filed on October 14, and the General Counsel's opposition was filed on October 21. The hearing is expected to last at least 30 days (nonconsecutively over several months) and include testimony from approximately 95 witnesses.

⁶ See Respondent's answer to the fourth consolidated complaint. According to Respondent's petition to revoke, Red Rock Resorts, Inc. is a publicly traded company that owns a direct equity interest in and manages Station Casinos LLC, which owns and operates Respondents Red Rock, Boulder, and Palace.

Further, it is not the GC's burden to show how, when, or why Respondent formulated the benefits package. The Board infers that an announcement or grant of benefits during the critical period between the filing of a representation petition and the election is objectionable and violative of Section 8(a)(1). It is the employer's burden to rebut this inference by showing there was a legitimate business reason for the timing of the announcement or grant of benefits, i.e., that the benefits were part of a previously established company policy and the company did not deviate from that policy upon the advent of the union. See *Watco Transloading, LLC*, 369 NLRB No. 93, slip op. at 16 (May 29, 2020); and *Shamrock Foods Co.*, 366 NLRB No. 117, slip op. at 13 (2018), enfd. 779 Fed. Appx. 752 (D.C. Cir. 2019), and cases cited there.⁷ And whether the Fertittas' testimony would be relevant and helpful in discrediting Respondent's rebuttal case appears entirely speculative at this point.⁸

Accordingly, the Fertitta subpoenas ad testificandum are revoked without prejudice to the GC seeking reconsideration or reissuing the subpoenas if the documents produced pursuant to the GC's subpoena duces tecum⁹ and/or the evidence adduced at the hearing provide substantial reasons to believe the Fertittas' testimony would be relevant to any of the complaint allegations and that its probative value would not be "substantially outweighed by a danger of . . . undue delay, wasting time, or needlessly presenting cumulative evidence" under FRE 403.

Dated, San Francisco, California, October 23, 2020



Jeffrey D. Wedekind
Administrative Law Judge

⁷ Thus, this is not a situation, as in 8(a)(3) discrimination cases, where subpoenaing the CEO or other top executives to testify as adverse witnesses under FRE 611(c) regarding the company's knowledge of union activity, motive, and defense might be relevant and helpful in establishing the GC's prima facie case. Although the consolidated complaint includes various 8(a)(3) allegations, the GC's opposition to the petition to revoke does not assert that the Fertittas' testimony is relevant to them.

⁸ In light of the foregoing, it is unnecessary to address Respondent's argument that the so-called "apex doctrine" applied by some courts under FRCP 26 and 45 in evaluating pretrial depositions of top corporate officials should be applied to Board hearing subpoenas and that the Fertitta subpoenas should be revoked pursuant to that doctrine. See *F.T.C. v. Bisaro*, 757 F. Supp. 2d 1, 9 (D.D.C. 2010). See also *Zimmerman v. Al Jazeera America, LLC*, 329 F.R.D. 1, 6-7 (D.D.C. 2018).

⁹ Respondent's pending October 21 petition to partially revoke the GC's subpoena duces tecum (B-1-1AM2EGB), including Respondent's argument that the subpoena should be revoked to the extent it seeks production of documents from the Fertittas, will be addressed separately.

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